IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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SUPREME COURT OF APPEALS
OF WEST VIRIGINIA

**MICHAEL WORLEY and**
**CYNTHIA WORLEY, his wife**

**Appellants,**

**v.**

**Appeal No. 33190**

**BECKLEY MECHANICAL, INC., et al.**

**Appellees.**

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# BRIEF OF APPELLANTS

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## I.
## Kind of Proceeding and Nature of the Ruling in the Lower Tribunal

This Appeal arises out of an occupational injury which occurred on May 28, 2000 when Appellant, Michael Worley (Appellant/Worley) was hurled from a scissor lift by the force of an exploding pressurized valve onto a concrete floor some 30 feet below.

Appellant filed the within civil action on July 10, 2002 alleging various theories of recovery against Appellees. Appellees raised the statute of limitations defense in their answers and after a period of discovery the parties agreed, and the Court concurred, to bifurcate the trial and schedule first a bench trial on the issue of the statute of limitations and which was conducted beginning on November 16, 2004.

The issue at trial was whether Michael Worley was under a disability that suspended or tolled the running of the statute of limitations.

To reach the question of disability, the Court necessarily had to determine whether or not the Appellant was "insane" with the meaning of West Virginia Code §55-2-15 and concluded that Worley was not "insane" in its Memorandum Order of September 21, 2005 and which became a

Final Judgment Order on December 13, 2005. In its ruling, the Court framed the issue by stating that as in criminal cases a person is presumed sane, and therefore, a person is presumed to be sane for purposes of the application of the statute of limitations. Appellants appeal from this ruling because the Court failed to consider that the tolling provision embodied in West Virginia Code §55-2-15, for persons with a disability is remedial in nature and was not correctly applied as a matter of law by the Circuit Court. The Court concluded, explaining its decision:

> "As recited above, the statute speaks to 'insanity' at the time of the injury. No one claims that the plaintiff was insane at the time of the injury. Within the terms of the statute, and according to Harper v. Walker Mfg., cited above, the Plaintiff would be deemed insane if he had been insane at the time of the injury or instantly rendered insane by the injury. This Court has found, however, that he was not rendered 'insane' simultaneously with the injury." Memorandum Opinion at p. 8, 9.

Instead the Court incorrectly applied the savings statute and created an impermissibly higher burden of proof for the Appellant who was continuously hospitalized from May 28 to July 10, 2000 when he was transferred not home but to a rehabilitation hospital and was therefore, "a person of significantly impaired capacity to maintain acceptable levels of functioning in areas of intellect, emotion and physical well-being." West Virginia Code §27-1-2.

Finally, this Appeal allows the Court to define the period of time during which the savings statute applies when the period of "insanity" is only temporary.

## II.
## Statement of Facts

On May 28, 2000, a Sunday around 7:00 a.m. to 7:30a.m., the Appellant was working as a pipe fitter employed by Appellees, Beckley Mechanical, Inc. and/or West Virginia Sprinkler, Inc., on a construction project at a building owned by the Raleigh County Building Commission.

Appellees, Klockner Pentaplast of America, Inc., Riddleberger Brothers, Inc., and Nielsen Contracting, Inc., shared other responsibilities at the work site.

On that early Sunday morning, Worley's job was to remove a valve which was to have been depressurized and which he believed was depressurized but was not. The valve was high above the ground and near the ceiling, a typical location for a fire suppressant system water line. As he loosened the valve, it exploded under pressure, struck him, and knocked him off a scissor lift onto a poured concrete floor 30 feet below.

EMT's were later called, but not immediately because Worley was working alone. He reported a loss of consciousness before he was found by a co-worker who summoned help. Because of his mental and physical condition, a history could not be obtained when he arrived at the Raleigh General Hospital Emergency Room at about sometime between 8:55 a.m. and 9:02 a.m.

The force of the exploding valve even embedded metal fragments in Worley's face. More significant, emergency room personnel reported they were told by the paramedics Worley suffered a loss of consciousness, Appendix A, p. 9. Other serious chest and abdominal injuries were noted as was severe pain for which Morphine was administered.

The Circuit Court in its' Memorandum Opinion of September 21, 2005, identified the issue as what was the Appellant's medical condition between May 28, 2000 and July 10, 2000, and whether this condition satisfied the legal standard applicable to the suspension of a statute of limitations due to insanity. The Court then correctly pointed to West Virginia Code §55-2-15 as the basis for suspending the statute of limitations on the grounds of insanity. That statute provides:

> "If any person to whom the right accrues to bring any such personal action, suit or scire facias, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is mentioned in section eight of this article, except that it shall in no case be brought after twenty years from the time such right accrues." Mem. Op. at p. 3.

The Court then went on to correctly identify the source of the definition for the term insane,

West Virginia Code §2-2-10(a) which states, "insane person" to "include everyone who has a mental illness as defined in the West Virginia Code §27-1-2, and that statute defines "mental illness" as "a manifestation in a person of significantly impaired capacity to maintain acceptable levels of functioning in areas of intellect, emotion and physical well-being." Id.

In evaluating the evidence, the Court first determined the Appellant suffered neither a traumatic brain injury nor an organic brain injury as a result of the fall. In short, the Court found there was an absence of physical evidence or other forms of objective evidence that the Appellant suffered trauma to the brain.[1]

The Court's Memorandum Opinion does not explain why no mention is made of the documented loss of consciousness, Worley's inability to provide a history and Morphine administration all evidenced on May 28, 2000, in concluding Worley was not insane immediately after or as the result of his injury, Appendix A.

Secondly, the Court concluded as a matter of law that a person is not insane at the time of his injury or immediately thereafter when he is capable of understanding that he has been injured and the cause of his injury. Mem. Op. at p. 6.

In that connection, the Court framed the issue by saying that in criminal cases, a person is presumed to be sane for purposes of criminal responsibility. Accordingly, the Court concluded, "under the same rationale, it is this Court's opinion that a person is presumed to be sane for purposes

[1]The Circuit Court's first finding that Worley did not suffer a "traumatic brain injury" or an "organic brain injury" is not challenged in this appeal, nor need it be to reverse the Circuit Court. The issues in that finding are appropriately committed to the trier of fact under the abuse of discretion standard. While it is not conceded that standard cannot be satisfied, consideration of the entire record, including the transcripts, is necessary to reach that issue. However, the second finding may be decided based on the limited record and applicable law without the necessity to consider the first finding.

of the application of this exclusion to the statute of limitations."[2]

In searching for its answer, the Court related that insanity defined by the statute is analogous to incompetency because an insane or incompetent person is not bound to the outcome of various legal processes. Thus, the Court reckoned that it must first determine what a person needs to be understood in order to be bound by the statute of limitations.

To support its analysis, the Court noted that on the day of the accident, Worley discussed the event at the hospital with his employer, Mr. Mahaffey. However, what the Court did not note is that on that same day a period of unconsciousness was recorded. Worley was unable to provide a history to hospital personnel when admitted and he was placed on Morphine, Appendix A.

Throughout its memorandum opinion the Court acknowledged that there were days Appellant was barely able to function. A brief review of Appellant's evidence as stated in the medical records and by witnesses including physician testimony, as well as that evidence of both the Appellants and Appellees and which is analyzed in the Memorandum Opinion is necessary and helpful:

> "During the course of his subsequent treatment, he suffered pain and disorientation as the result of his injury, the medications, and the treatment of his injuries. His treatment records show that he had days in which his functioning was better than on other days, and it could be concluded that there were days on which he barely functioned at all. But the evidence supporting the conclusion that on the day of the accident, for a few days thereafter, and for significant periods of time during his hospitalization, the Plaintiff had sufficient functioning to understand that he had been injured. The evidence also supports the conclusion that the Plaintiff's level of functioning rose and fell during his hospitalization, and that at times his level of functioning was so low that he met the legal definition of 'insanity'. It must be noted, however, the running of the statute of limitations is suspended if he is insane 'at the time the [cause of action] accrues.' (Emphasis in original) The Plaintiff's cause of action for his injury accrued on the date of his injury. If he was sufficiently competent on May 28, 2000, to communicate to Mr. Mahaffey that he had been injured in an accident at work, then the conclusion must be drawn that he understood

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[2]As covered in more depth, infra, West Virginia Code §55-2-15 is a tolling statute. Tolling statutes are considered remedial in nature, McKinney v. Fairchild International, Inc. 487 S.E.2d 913 (WV 1997). (an appeal for the Circuit Court of Raleigh County, Burnside, J.). In fact, our Court has emphasized the protection afforded by the tolling statute to minors and those who lack mental capacity to act intelligently with regard to their legal rights.

he had been injured by someone other than himself. His level of functioning was therefore 'acceptable' for the purpose of his understanding a body of data sufficient to trigger the running of the statute of limitations, upon which the Court concludes that the Plaintiff was not 'insane' on May 28, 2000, for purposes of the statute."

In reaching this conclusion, the Court ignored Appellant's testimony that he had no recollection of that first day or the rest of his stay at Raleigh General and until he was admitted to Health South in Huntington.

The following paragraph then summarized the Court's rationale:

"The statute does not provide for the situation where a person is sane at the moment the cause of action accrues but becomes insane afterward. The sole question presented by the statute is whether he was insane at the time the cause of action accrues. The evidence supports the conclusion that he was sane at this moment, and that he continued to be sane for a few days thereafter. The evidence would present more difficulty if the question is whether he was insane on any given day following the date that the cause of action accrued. There may have been many days that he was and days that he was not. But the statute does not work that way, and so that is not the question." (emphasis supplied) Mem. Op. at pp. 6, 7.

The Appellant offered a report by PsyCare Inc., a medical group whose President, Dr. Russ Voltin, who was later employed as Appellees expert witness, which reported that Appellant's neurological state was post-loss of consciousness due to traumatic injury, Appendix A, p. 25. Again, that is part of the first finding not here challenged.

Appellee's medical expert, Dr. Russ Voltin conceded in his trial testimony that except for May 28 and 29, June 28 and 29, and July 3-10, Worley's diagnosis satisfied the term mental illness. This is important because the number of days attributed to Worley's "insanity" by Dr. Voltin appears to exceed the number of such days determined by the Court. The Court, however, did not specifically address evidence identifying the exact days during his admission Worley was "insane", and instead generalized its findings and even though Appellees conceded Worley was "insane" as that term is defined in the statute for a substantial majority of his confinement at Raleigh General.

In fact, the record consisting of the defense expert medical opinion, lay testimony and

medical records shows no dispute that Worley was insane for all but twelve of his forty-two day admission to Raleigh General, Appendix A pp. 1-4. A more detailed examination of the record though, reveals Worley's injuries even on those days met or exceeded this statutory standard, although for purposes of this appeal the number of those days is largely irrelevant. The Health South discharge summary confirms his ravaged medical condition, Appendix A, p. 22, and notes on admission, July 10, Worley could not bathe, dress, or care for himself in any way.

As noted above, on the first of those days, May 28, there is also no dispute Worley after his fall suffered loss of consciousness, was unable to provide a history on admission and was administered Morphine, a strong pain narcotic, Appendix A. Nor could he have filed a lawsuit since it was a Sunday.

On the second of those days, May 29, the Raleigh General Hospital records show that he was still on Morphine, confined to a bed, needed to be bathed and his eyes opened to speech. In fact, by the next day he was sedated and placed on a ventilator, Appendix A, p. 10. That would make it even harder to file a lawsuit.

As for the limited number of days in dispute, on June 28 and 29, he underwent surgery with a general anesthesia for a billary hepatic cutaneous fistule on June 28. Also, on that day the medical records disclose he was responsive to comments, had a core knowledge deficit and was vomiting. On the next day, he vomited large amounts of greenish liquid and needed a shave and a bath because he could not perform those tasks himself.

Turning to July 3 through 10, the medical evidence is summarized as follows:

July 3 vomited, refused breakfast lunch and dinner, refused to get out of bed and oral care given by his wife;

July 4 vomiting, sick, refused breakfast, oral care given by his wife, refused to get up and out of bed;

July 5 vomited greenish fluid, refused breakfast, bath, shave and oral care given by his wife, sleeping some, Phenegren given, didn't feel like getting up;

July 6 vomited, both shave and oral care given by his wife, resting quietly, sleeping off and on, awake to eat lunch;

July 7 Resting quietly, oral care given by his nurse, pale, denies pain and shortness of breath;

July 8 Refuses advance directive, continuous monitor, became confused at times to place, resting with eyes closed;

July 9 No records; and

July 10 Vomiting green bile, in bed asleep upon admission to Health South, required assistance for bathing, dressing, toileting, toilet transfers, tub/shower transfer and bowel and bladder care.

The medical records, Appendix A, p. 5-23, show from the beginning on May 28, a loss of consciousness, inability to provide a history and Morphine administration to July 10, 2000 when he arrived at Health South in an emaciated condition, Appendix A, p. 22. This discharge summary notes when Worley first started therapy and stood up, his systolic blood pressure reading dropped forty points.

While Worley may have been conscious and not appear insane on these days according to the Circuit Court, to find that he was able to maintain acceptable levels of functioning in intellect, emotion, and physical well-being finds no support and is absurd. Worley refused to eat and was not even capable of performing the most basic hygiene tasks. The Circuit Court would have Worley, in a medicated state, unhook himself from medical equipment and pull out the Yellow Pages to consult with an attorney on one of the few, intermittent days in which he was even somewhat coherent. Clearly, this is not a situation where Courts would expect someone to be capable and responsible to contact legal representation while heavily medicated and unable to care for himself. With the condition Worley was in on these few, "lucid" days, he was still so incapacitated that any

contract between himself and an attorney would likely be invalid. This is why various jurisdictions have required the "lucid intervals" to be of significant duration, unlike those contestably experienced by Worley. Of course, fractions of days are considered the same as a day. Kyle v. Green Acres at Verona, Inc., 207 A.2d 513 (N.J. 1965).

The Court pointedly observed that in the period from May 28, 2000 to June 3, 2000 the medical evidence and Appellant's expressed awareness that he had been injured on the job supported the factual conclusion that it is more likely than not Appellant was sane from May 28 through June 2, 2000, and was neither insane at the time of his injury nor rendered insane simultaneously with the injury. Mem. Op. at pp. 8, 9.

Finally, the Court concluded:

> "The statute of limitations makes no provision for the onset of insanity after the injury. While the evidence of Plaintiff's condition after June 3, 2000, is subject to differing interpretations, it is irrelevant to the issue raised by the statute because he was sane at the time of the injury." Mem. Op. at p. 9.

In its analysis of the application of the "insanity" the Court fashioned an analogy to criminal responsibility:

> "A person is presumed to be sane for the purposes of criminal responsibility. State v. McCauley, 130 W.Va. 401, 43 S.E. 2d 454 (1947), and presumed to be competent as a witness. State ex rel Azeez v. Mangum, 195 W.Va. 163, 465 S.E.2d 163 (1995). Under the same rationale, it is this court's opinion that a person is presumed to be sane for the purposes of the application of this exclusion to the statute of limitations. Accordingly, the question is not whether Plaintiff was sane at the relevant moment, because that is presumed, but whether he was insane as that term is applied by the statute." Mem. Op. at pp. 5, 6.

## III.
## Assignments of Error

1. IN THAT THE TOLLING PROVISION OF WEST VIRGINIA CODE §55-2-18 RELATING TO PERSONS WHO ARE "INSANE" IS A REMEDIAL STATUTE, THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN IMPOSING A HIGHER BURDEN ON APPELLANT THAN SHOWING HE HAD A "MENTAL ILLNESS" MEANING A MANIFESTATION IN A PERSON OF SIGNIFICANTLY IMPAIRED CAPACITY TO

MAINTAIN ACCEPTABLE LEVELS OF FUNCTIONING IN AREAS OF INTELLECT, EMOTION AND PHYSICAL WELL-BEING."

2. THE CIRCUIT COURT ERRED IN DETERMINING THE SAVINGS STATUTE REQUIRED APPELLANT BE "INSANE" SIMULTANEOUSLY WITH HIS INJURY AND IN REQUIRING CONTINUOUS INSANITY THROUGHOUT HIS HOSPITAL ADMISSION.

## IV.
## Standard of Review

This appeal concerns questions of law and the interpretation of a statutory scheme relating to tolling provisions of West Virginia Code §55-2-15, coordinating the statute of limitations for persons who are "insane" within the meaning of West Virginia Code §2-2-10(a) and as such the de novo standard of review applies. Miller v. Monongalia County Board of Education, 556 S.E.2d 427 (W.Va. 2001).

## V.
## Argument

1. THE CIRCUIT COURT ERRED IN NOT RECOGNIZING THE REMEDIAL PURPOSES OF THE TOLLING PROVISION CONTAINED IN WEST VIRGINIA CODE §55-2-15.

Under any factual analysis it is clear according to the emergency room record that on May 28, 2000, Michael Worley sustained a loss of consciousness "per paramedics", Appendix A, p. 9, when he was injured, which included a fall from a height of thirty feet precipitated by a concussive blast. He was unable to provide a history when admitted to the hospital, was placed on Morphine and throughout a 42 day hospital stay received Morphine frequently for pain, daily personal hygiene assistance, or was not responsive, underwent additional surgeries, and deteriorated and suffered from malnutrition at discharge.

A single conversation with his boss or signing a surgical consent while in the course of his hospital stay did not establish he was sane for purposes of this remedial statute. On the other hand, Appellant submits that a person who was unconscious, suffered abrasions, internal injuries, required

regular and extensive Morphine, required bathing care, daily personal hygiene care and feeding is a person who manifests a significantly impaired capacity to maintain acceptable levels of functioning in areas of intellect, emotion, and physical well being, which is the only standard that applies to this determination, W. Va. Code §27-1-2.

Very clearly, the Court expected proof Appellant was insane not that his physical well being did not function acceptably, when it referenced the criminal responsibility standard. Mem. Op. at p. 5.

In applying this remedial statute to the facts of the case, the Court understood, to a limited extent, the gravity of the injuries but failed to apply the correct legal standard. The Court demonstrated it was guided by the wrong standard of proof of sanity in a criminal sense. Even though the Court professed to determine whether the Appellant was insane for some of the period in question as that term is applied by the statute, the Court never took into account those multiple facts which related to Worley's capacity to maintain acceptable levels of functioning in areas of intellect, emotion and physical well being.

Appellant submits that a hospitalized patient who because of physical injury was prescribed and administered narcotic drugs for pain, who cannot brush his teeth or take care of his personal hygiene and whose nutrition continuously and markedly deteriorated is not maintaining an acceptable level of functioning even if an "interested party" recounts otherwise.

Worley denies all remembrance of any such conversation with Mr. Mahaffey, and for the Court to credit Mr. Mahaffey's version only verifies the Court's lack of understanding of the remedial purposes of this tolling statute.

This Court in McKinney v. Fairchild International, Inc., 487 S.E.2d 913, 922 (W.Va. 1997) referencing another savings statute, West Virginia Code §55-2-18, characterized it as, ". . . our

remedial and broadly structured savings statute."

As a general rule, our Court recognizes that a savings or tolling statute is designed to extend the tolling period so that rights may be protected. Whitlow v. Bd. of Ed. of Kanawha Cty, 438 S.E.2d 15, 23 (W.Va. 1991).

However, in its Memorandum Opinion the Court completely failed to account for the remedial purposes of the statute. Worley was so incapacitated that he was unable to bathe, shave or care for his personal hygiene; he was drugged, had loss of consciousness and dozed off to sleep, May 28; eyes open only to speech, on Morphine, on ventilation, sedated, disoriented, May 29; surgery under general anesthesia, June 28; vomited large amounts of greenish liquid, June 29; and as noted in the statement of facts suffered from both excessive vomiting and confusion, July 3-10.

In spite of a plethora of medical records evidencing Worley's "significantly impaired capacity to maintain acceptable level of functioning in areas of intellect, emotion and physical well being", the Court credited the testimony of an adverse and interested witness, Mr. Mahaffey, and viewed Appellant's proof of burden in terms of a criminal party proving insanity.

This rigid approach conflicts not only with well established West Virginia law, but decisions by numerous Courts, including the United States Supreme Court. There in Hardin v. Straub, 109 S. Ct. 1998 (1989), the Supreme Court in reversing a Court of Appeals decision which dismissed a prisoner §1983 action, without taking into account a tolling provision, held that such suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules because the state tolling statute is consistent with §1983's remedial purpose.

This endorsement of the remedial purposes of a tolling statute was ignored by the Circuit Court which committed reversible error in its analysis of the effect of this tolling provision.

It is also instructive to analyze the "criminal responsibility" standard referenced by the Court.

That standard is expressed in many decisions of this Court as whether the accused "... had the mental capacity to conform his conduct to the requirements of the law..." State v. Rowe, 285 S.E.2d 445, 447 (W.Va. 1981). Reference to that standard contaminated the Court's analysis of whether Worley proved by a preponderance of the evidence that he "...manifests(tation) a significantly impaired capacity to maintain acceptable levels of functioning in areas of intellect, emotion, and physical being." W. Va. Code §27-1-2.

A particularly apt authority on this issue is Fila v. Spruce Mountain Inn, 885 A.2d 723 (Vt. 2005). There in a claim brought by a patient against a residential facility alleging sexual assault by a male resident, the Court agreed with the plaintiff that the trial court applied the erroneous standard of insanity. The standard applied by the trial court was whether a "person's mental disability makes him unable to manage his business affairs or estate, or to comprehend his legal rights and liabilities." That standard is very similar to the West Virginia standard for criminal responsibility. State v. Rowe, supra. The Vermont Court said:

> "Although the trial court here made passing reference to plaintiff's ability "to make decisions about her life, " the record discloses that it focused principally on the absence of evidence of a "major mental illness" or "psychosis" or other evidence normally associated with the higher standard for criminal insanity." 885 A.2d at 726.

While it is true here that the Circuit Court shifted gears after referencing the insanity standard for criminal responsibility and cited the statutory standard applicable to manifesting an ability to maintain acceptable levels of functioning, it is equally clear the Court betrayed its reliance on the wrong standard because it could never explain how someone who lacked the ability to provide personal hygiene, including brushing his teeth, could comprehend his legal rights. Its conclusion follows the criminal responsibility standard.

It is therefore a fair conclusion that the Circuit Court incorporated the criminal responsibility standard of insanity in its findings and thus committed prejudicial error.

2. THE CIRCUIT COURT ERRED IN THE SAVINGS STATUTE APPELLANT BE "INSANE" SIMULTANEOUSLY WITH HIS INJURY AND IN REQUIRING CONTINUOUS INSANITY THROUGHOUT HIS HOSPITAL ADMISSION.

Appendix A, p. 5-23, shows clearly and convincingly that beginning with a loss of consciousness, inability to provide a history and administration of Morphine through his discharge where he was termed emancipated, Mr. Worley could not and did not maintain acceptable levels of functioning, particularly for his physical well being.[3] The Court's conclusion to the contrary is against the weight of the evidence, as spoken by the medical records presented to the Court and admitted in evidence, Appendix A, p. 5-23.

State appellate courts and federal district courts across the country reach a different result than the Circuit Court. Their opinions capture the guiding principles controlling the analysis of this issue which eluded the Circuit Court.

An interesting starting point is Duncan v. Vick, 7 Ky. Op. 1074 (Ky. 1886), which states the principle:

> "Where a person is of unsound mind to whom a caus of action has accrued has a lucid interval, limitation does not begin to run against him unless the interval lasts sufficiently long for him to look into his rights in the matter and take steps toward their assertion."

Evidently, the Kentucky Court of the horse and buggy age, showed far more understanding and insight of the disability caused when a person cannot function than this Circuit Court in the internet age when it said:

> "We may not assume that when the Legislature drafted this statute it had not considered the obvious possibilities that a person might be sane at the time the cause of action accrues but become insane afterward, or suffer recurring periods of insanity while the statute is running." Mem. Op. at p. 9.

In reality, the obvious answer is, as other Courts have stated, the tolling provision is only lost

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[3]Again, the Court's finding concerning a traumatic brain injury or organic brain injury is not challenged here.

when there is a "lucid interval of significant duration." That was the opinion of the Court in Libertelli v. Hoffman-La Roche, Inc., 565 F. Supp. 234 (S.D.N.Y. 1983). In the present case, the Court based its decision it seems, on a brief conversation recounted by Mr. Mahaffey, an interested party, which for purposes of this Petition, is assumed as true. However, the medical records of that day, Appendix A, p. 5-9, and the following day, do not support the Court's conclusion that Worley was not insane until June 3. There is no rational basis in the medical records to support that conclusion, Appendix A.

New Jersey is another jurisdiction which disagrees with the Circuit Court's decision. In Kyle v. Green Acres at Verona, Inc., infra, the Court held that if a plaintiff's insanity developed on or subsequent to the date of the alleged wrongful act of the defendant, and within the period of limitations and insanity resulted from defendant's conduct, the action is not barred, if the action was started within a reasonable time after the restoration of sanity, or the appointment of a guardian or committee.

The facts in Kyle are particularly apt and instructive. Plaintiff fell on an icy sidewalk and fractured her hip on January 21, 1957; surgery was performed on January 23, 1957; she was released from the hospital on February 14, 1957; admitted to a nursing home and lived at home until March 14, 1957, when she was admitted on her own for further surgery and for a nervous condition; she was treated and released then on July 31, 1957 and returned home where she stayed until August 27, 1957, when she again voluntarily admitted herself to a mental hospital. On October 13, 1957, she was officially committed as insane; she was released to a nursing home in April 1961, and discharged in March 1962, and filed her Complaint May 28, 1962.

The New Jersey Court acknowledged the remedial provisions of the tolling provisions for insanity in a statute of limitations. Its decision is directly opposite to the Circuit Court here which

was sympathetic but not correct when it said, "This might seem a harsh result . . .". The New Jersey Court made clear that a "harsh" result is not required. It said: ". . . (Even) if insanity did not result at once, Plaintiff may still be able to furnish proof excusing his apparent laches."

The Court then added citing other New Jersey authority:

> "We there found such particular circumstances as to dictate not the harsh approach of literally applying the statute of limitations but the application of more equitable and countervailing considerations of individual justice."

Kyle strikes right at the heart of the Circuit Court's decision in two ways. First it obviates the "harsh" result ordained therein by saying:

> "But in the present case in terms of equally appealing equitable considerations, if plaintiff's insanity was caused by defendant's wrongful act, it may be said that such act was responsible for plaintiff's failure or inability to institute her action prior to the running of the statute of limitations. We feel that justice here requires us to carve out an equitable exception to the general principle that there is no time out for the period of time covered by the disability if the disability accrued at or after the cause of action accrued. Thus, a defendant whose negligent act brings about plaintiff's insanity should not be permitted to cloak himself with the protective garb of the statute of limitation." 207 A.2d at 519.

Secondly, Kyle allows for a reasonable time after restoration of sanity to commence a cause of action either by the plaintiff of by a guardian or committee. 207 A.2d at 520.

Lastly, with respect to Kyle, the New Jersey Court's opinion deserves a modicum of respect because the Court painstakingly researched the historic foundation of savings statutes, tracing their origin to the reign of Henry the Eighth in 1540 and to King James in 1623 which for the first time coupled a savings statute with insanity and through New Jersey's colonial era savings statute, and finally to the industrial age statutes enacted in 1877 and 1937. See 207 A.2d at 514, 515, 516.

Other jurisdictions are in agreement. New York in Lynch v. Carlozzi, 727 N.Y. S.2d 504 (N.Y. 2001) recognized the New York savings statute whose language is similar to West Virginia, and provides "...where a person entitled to commence an action is under a disability because of

insanity at the time the cause of action accrues, the time for commencement of such action shall be extended by the period of * * * disability."

Agreeing with other jurisdiction, the New York Court noted that the disability need not be adjudicated before the accrual of the cause of action.

The Court in Lynch explained that this tolling statute benefits only those individuals who are unable to protect their legal rights because of an overall inability to function in society. 727 N.Y S.2d at 506.

Finally, the Court in Lynch, answering the issue presented here, relied on a doctor's affidavit that the plaintiff had experienced no "lucid intervals" of significant duration so as to toll the statute, even though the Court cautioned the toll must be interpreted narrowly. 727 N.Y. S.2d at 506.

Georgia is another jurisdiction which rejects the narrow view taken by the Circuit Court here. In Cline v. Lever Brothers Company, 183 S.E.2d 63 (Ga.App.,1971) the Court order tolled the statute of limitations until the claimant regained the capacity to act for himself.

Appellant returns to our neighboring jurisdiction of Kentucky which in a case decided before the civil war presages the right result in this circumstance in Clark's Executor v. Trail's Administrators, 58 Ky. 35 (1858):

> "The length of time that a state of sanity must continue, in order that the statute of limitations shall begin to run, is such length of time as will enable the party to look understandingly into his affairs, and to have instituted an action to recover his rights, and it is a question of fact for the jury to decide."

Very much of the same result was reached by the Michigan Court of Appeals, Hill v. Clark Equipment Company, 202 N.W.2d 530, (Mich.App. 1972). There the Court pertinent to the Circuit Court's singular acceptance of the testimony of Mr. Mahaffey specifically rejected this approach by saying that an injured plaintiff who obtained workers' compensation and social security benefits, consulted with physicians or a lawyer did not establish incontrovertibly that he was not insane for

statute of limitations purpose.

Further, the Michigan Court recognized that the term insanity in the statute of limitations tolling provisions includes traumatic insanity and that which arises at the same time that Appellant's claim against Appellee accrues.

In interpreting a remedial statute, the Circuit Court erred in requiring continuous insanity. Given the totality of Mr. Worley's medical condition, the Court was required to allow him a reasonable opportunity to regain control of his "well being" before hastily dismissing his case.

Appellant, in urging this Court to reverse the Circuit Court, points to Feeley v. Southern Pacific Transp. Co., 234 Cal. App.3d 949 (Ca. 1991). There the Court reasoned that persons who are rendered completely unconscious by trauma and persons who are conscious but incapable are both entitled to the benefit of the tolling provisions. The Court said, and we adopt its rationale:

> "If the latter litigant is entitled to tolling during the period of incapacity, it would be arbitrary and harsh to deprive the former of the same benefit."

In the final analysis, the Circuit Court observed:

> "The Legislature could have chosen to address this possibility with a statutory alternative that allows the suspension of the statute of limitations for these periods of insanity and providing that the statute expires only when the interviewing periods of sanity accumulate a total of two years."

This is not a correct analysis of our savings statute which does not compel this harsh result, particularly when it is the defendant who turns the shield of this remedial statute into a sword that is wielded to bar this claim. Underscoring the Court's misunderstanding of this savings statute, the Circuit Court referenced Harper v. Walker Manufacturing Company, 699 F. Supp. 85 (S.D. W.Va. 1988), an opinion by the late Chief Judge Haden. In that case the plaintiff suffered a crushed head injury which the Circuit Court considered was simultaneous with the injuring event. Mem. Op. at p. 7. It is noteworthy the savings statute, were it to establish a distinction between a simultaneous

insanity and a subsequent insanity, fails to say so. It is completely silent. Further following the Circuit Court's reasoning, the Appellant was injured on Sunday, May 28, so even were he not simultaneously rendered insane, he could not have filed an action anyway. The next day he was hooked to a ventilator. But the Circuit Court's analysis of Harper, is in itself incorrect. Chief Judge Haden only referenced mental incompetence subsequent to the accident and not simultaneous to it. (Emphasis added) Harper, 699 F.Supp. at p. 87. Moreover, the plaintiff in Harper regained the ability to perform some daily functions, but the Court still considered the savings clause applied. In any event, the Circuit Court's reading of Harper to substitute simultaneous for subsequent, the actual term used by the Court, clouds its reasoning and does not stand on solid ground.

## VI.
## Conclusion

Appellants submit this for the foregoing reasons and authorizes the Order of the Circuit Court should be reversed and remanded with instructions to apply the savings statute to the Appellant's injury and with further directions that Appellant filed his tort claim within a reasonable time after his injury.

Respectfully submitted,

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**IN THE WEST VIRGINIA SUPREME COURT OF APPEALS**

**MICHAEL WORLEY and**
**CYNTHIA WORLEY, his wife**

**Plaintiffs,**

**v.**

**Civil Action No. 02-C-639-B**
**Judge: Robert A. Burnside, Jr.**

**BECKLEY MECHANICAL, INC., et al.**

**Defendants.**

## CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing original of the **BRIEF OF APPELLANTS,** has been served upon counsel of record by depositing a true and exact copy thereof, via United States mail, postage prepaid and properly addressed on this **20TH** day of **OCTOBER, 2006**, as follows:

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